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TO: Enforcement Committee Members

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SUBJECT: **Executive Director's Recommended Enforcement Decision**
Proposed Cease and Desist and Civil Penalty Order No. CDO 2016.02
(For Committee consideration on October 6, 2016)

Executive Director's Recommendation

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I. SUMMARY OF BACKGROUND TO THE ALLEGED VIOLATIONS

This enforcement proceeding involves alleged violations of the McAteer-Petris Act (MPA) and the Suisun Marsh Preservation Act (SMPA) at Point Buckler Island, which is located in the primary management area of the Suisun Marsh in Solano County (the Site). Point Buckler Club, LLC owns the Site. Mr. Sweeney is a principal of Point Buckler Club, LLC and owned the Site from approximately April 19, 2011, to October 27, 2014, when he conveyed the Site to Point Buckler Club, LLC. (Mr. Sweeney and Point Buckler Club, LLC are collectively referred to as Respondents.)

The MPA requires any person wishing to place fill, extract materials, or make any substantial change in use of any water, land, or structure, within the area of the Commission's jurisdiction, including the Site, to obtain a permit from the Commission. Govt Code § 66632(a).

The SMPA generally requires any person wishing to perform or undertake any "development," as that term is broadly defined in Public Resources Code Section 29114(a), in the primary management area of the Suisun Marsh, including the Site, to obtain a marsh development permit (MDP) from the Commission. Pub. Res. Code §§ 29500, 29501. However, no MDP is required for any development specified in the component of the local protection program (LPP) for the Suisun Marsh prepared by the Suisun Resource Conservation District (SRCD) and certified by the Commission.

The SRCD's component of the LLP, known as the Suisun Marsh Management Program (SMMP), consists of a number of elements including, but not limited to, individual water management programs (commonly referred to as individual management plans or IMPs) for each privately-owned "managed wetland" within the primary management area of the Suisun Marsh. The SMPA defines the term "managed wetland" to mean "those diked areas in the marsh in which water inflow and outflow is artificially controlled or in which waterfowl food plants are cultivated, or both, to enhance habitat conditions for waterfowl and other water-associated birds, wildlife, or fish…." Pub. Res. Code. § 29105.

In 1984, IMPs were developed for each privately-owned managed wetland in the primary management area of the Suisun Marsh, including the Site, and were certified by the Commission. The IMP for the Site, denominated the "Annie Mason Point Club" (Annie Mason IMP), states that the club is contained within a single levee surrounded by Grizzly Bay to the north and Suisun Cutoff to the south, and describes two water control structures, one on the east side and another on the north side of the Site. The Annie Mason IMP further states that it is "necessary that the club follows a regular program of water management," and that:

> *Proper water control necessitates inspection and maintenance of levees, ditches, and water control structures….Levees require frequent inspection and attention to prevent major breaks from occurring.*

Substantial evidence demonstrates that since at least the late-1980s, the Site was never managed in accordance with the Anne Mason IMP. Among other evidence, at all times subsequent to certification of the Annie Mason IMP, all property owners within the Suisun Marsh, including the Site, have been subject to certain regulatory requirements imposed by the United States Army Corps of Engineers (USACE) under the Clean Water Act and/or the Rivers and Harbors Act of 1899, which have been set forth in a series of Regional General Permits (RGPs) issued for successive five-year terms. The RGP currently in effect, RGP3 dated July 8, 2013, regulates, among other things, levee repairs "to repair damage from storms and to counteract subsidence of the levees." The RGP3 also requires property owners who intend to perform repair and other activities regulated by the permit to prepare and submit to SRCD a report (called a "work request form") that describes the proposed activities. The RGP3 gives to the SRCD the responsibility to compile and submit to the USACE the reports that the SRCD receives from property owners. Previous versions of the RGP contained regulatory requirements of similar scope and content. SRCD's records since 1994 reveal no reports submitted by any owner of the Site for purposes of compliance with an RGP regarding repair or

maintenance of the levees at the Site. This complete lack of SRCD records reflects that no levee repair or maintenance occurred at the Site for at least almost 20 years until Mr. Sweeney commenced extensive new levee construction and excavation work, as discussed below.

Beginning no later than August 1988, with a first levee breach, the areas of the Site formerly consisting of managed wetlands began reverting to tidal marsh due to: (a) the lack of maintenance of the levees and water control structures; (b) the constant exposure of the Site to daily tides and the forces of the waves and winds; and (c) the periodic exposure of the Site to storm events. The reversion to and persistence of the Site as tidal marsh continued after May 1991 from three levee breaches, after August 1993 from five levee breaches, and after August 2003 from seven levee breaches, which provided daily tidal exchange between the Bay waters and the interior channels and ditch, and provided internal tidal circulation throughout the Site. During this same period, due to the progressive erosion and deterioration of the remnant levees, portions of the Site interior to the levees were subject periodically to the inflow and outflow of tidal waters from overtopping of the levees.

An aerial photograph taken in April 2011, the month Mr. Sweeney purchased the Site, shows that the levees at the Site were breached at seven different locations and the entire Site was intersected by countless tidal channels that, together with the remnant interior ditch, and combined with periodic overland flow of tidal waters from overtopping of the remnant levees, provided internal tidal circulation throughout the entire Site.

Before Mr. Sweeney began conducting levee construction and excavation activities at the Site, he knew that the placement of fill on levees in managed wetlands in the Suisun Marsh, including levee repair work, requires authorization from multiple agencies. In June 2011, Mr. Sweeney contacted the SRCD and the USACE regarding proposed levee repair work at Chipps Island (Club 915) in the Suisun Marsh. SRCD provided Mr. Sweeney with copies of the USACE's RPG and a relevant Biological Opinion prepared by the National Marine Fisheries Services, and Mr. Sweeney completed a Corps Wetlands Maintenance Permit Application. Working with SRCD through the permitting process, Mr. Sweeney obtained authorization from the Corps to

perform the levee repair under the RGP. However, he did not adhere to the RGP3's conditions, and on October 24, 2011, the Corps issued a Notice of Violation to Mr. Sweeney regarding his unauthorized work at Chipps Island that resulted in an illegal discharge of fill.

BCDC staff believes that when Mr. Sweeney contemplated the nature and extent of the levee construction, excavation, and other work that he planned to perform at the Site, based on his experience with SRCD and the USACE to authorize a levee repair at Chipps Island, he made a knowing and intentional decision to proceed without contacting SRCD, the USACE, or BCDC, and without applying for any of the permits that he knew or should have known were required. Staff further believes that Mr. Sweeney intentionally proceeded without contacting any regulatory agency to avoid the expense and delay of the permitting process, including the costs that would have been associated with providing mitigation for adverse impacts to tidal marsh, biological resources, and water quality. Although Mr. Sweeney may have considered that he might later have to obtain after-the-fact authorization for his work, by proceeding without applying for the necessary permits, Respondents benefitted economically by being able to conduct their kiteboarding business, and expand their kiteboarding operations in the northwestern portion of the Site, for the past two years without having those operations disrupted or damaged from tidal action, including tidal flooding from periodic overtopping of the remnant levees.

II. SUMMARY OF THE ESSENTIAL ALLEGATIONS IN THE VIOLATION REPORT/COMPLAINT FOR THE ADMINISTRATIVE IMPOSITION OF CIVIL PENALTIES

The Executive Director issued a Violation Report/Complaint for the Administrative Imposition of Civil Penalties (Complaint) to Respondents on May 23, 2016. Following is a summary of the essential allegations of the Complaint:

Over an approximately 20-year period before Mr. Sweeney purchased the Site: (a) the levees and water control structures were not maintained; (b) the Site was subject to tidal action and consisted of tidal marsh; and (c) the Site did not contain managed wetlands as defined in the SMPA. For these reasons, when Mr. Sweeney purchased the Site, the Annie Mason IMP no

longer applied to the Site and, therefore, no potential development at the Site was specified in the SRCD's component of the LLP. Therefore, at the time Mr. Sweeney purchased the Site, a MDP from the Commission was required pursuant to the SMPA, to authorize any "development" (as defined in Pub. Res. Code § 29114(a)) at the Site, and a permit was required by the Commission, pursuant to the MPA (Government Code § 66632(a)), to authorize the placement of any fill or to make any substantial change in use of any water, land, or structure at the Site.

Beginning by no later than May 2012, and without contacting or applying for a permit from BCDC (and without contacting SRCD or the USACE), Mr. Sweeney began excavating trenches and ditches in tidal marsh, rebuilding eroded levees, and placing fill on tidal marsh to construct new levees at the Site. This work included but may not have been limited to constructing new levees by excavating material from the ditch inside the eroded levees and placing such material on (a) the remnants of the eroded levees in locations where the eroded levees remained; and (b) tidal marsh and waters of the State inside former levee locations where the former levees had completely eroded and disappeared and had been replaced by tidal marsh. In addition, without applying for or obtaining a permit from BCDC, Mr. Sweeney removed one of the former water control structures from the Site and, in approximately September 2013, replaced a sunken dock located in the southeast portion of the Site with a larger dock at the same location. Each of these unauthorized activities constitutes "development" as defined in Public Resources Code Section 29114, and the construction of new levees, and installation of a replacement dock each constitutes both placement of fill and a substantial change of use of land and water under Government Code Section 66632(a).

Some time in or about 2014, and without applying for a permit from BCDC, Respondents began operating the Site as a "Private Sport and Social Island located in the California Delta. Ideally suited for the Bay Area / Silicon Valley Executives who want to get away and enjoy kiting in a safe and secluded environment without boarding a plane." www.pointbucklerisland.com.

See www.facebook.com/pointbucklerclubVIP. Such activities constitute both a "substantial change of use of land and water" under the MPA (Govt Code § 66632(a)) and "development" (as defined in Pub. Res. Code § 29114) under the SMPA.

On November 14, 2014, BCDC staff inspected the Site and identified a number of violations of the SMPA and the MPA. During the Site inspection, BCDC staff provided Mr. Sweeney with a copy of the Annie Mason IMP because he had previously informed BCDC staff that he did not have a copy of that document and had requested a copy.

The unauthorized work Respondents performed at the Site from May 2012 to January 29, 2015, as shown in a series of aerial photographs and Google Earth images, includes the following:

1. Initiated trench excavation and filling activities by no later than May 2012;

2. Installed a large dock in Annie Mason Slough and began grading in the southeastern corner of the Site by February 3, 2014;

3. Conducted levee construction and ditch excavation activities along the southern and southwestern portion of the Site, closing two of the tidal breaches, by March 24, 2014;

4. Conducted levee construction and ditch excavation activities in a clockwise direction around to the northeastern portion of the site, closing off the five remaining tidal breaches and cutting off all tidal channel connectivity to the interior of the Site, by August 6, 2014;

5. Completed the final segment of levee construction and ditch excavation activities along the eastern portion of the Site by October 28, 2014; and

6. Excavated three crescent ponds in tidal marsh in the interior of the Site by January 29, 2015.

On January 30, 2015, BCDC sent a letter to Respondents regarding the unauthorized work observed during the November 14, 2014 Site inspection. The letter discussed the regulatory framework governing the Suisun Marsh and, in particular the Site, and explained that based on

available information, the history of the Site, and the recent Site visit, the Site had never been managed in accordance with the Annie Mason IMP and had long ago reverted to a tidal marsh due to neglect, abandonment, and/or the forces of nature. The letter advised Respondents that a MDP from BCDC was required prior to performing any development at the Site, and that any work that could not be retroactively approved through such a permit would likely need to be removed, restoring the Site to tidal marsh. BCDC staff recommended that Respondents restore the Site, following BCDC approval of a professionally prepared plan, or begin compiling a MDP application. Furthermore, BCDC staff requested that Respondents stop work at the Site.

A Google Earth image dated April 1, 2015 shows that Respondents continued to perform unauthorized work at the Site after receiving BCDC's letter dated January 30, 2015 directing them to stop work. The referenced image shows new work (since an aerial photograph taken on January 29, 2015) including, but not limited to: (a) excavating a fourth crescent pond in tidal marsh in the interior of the Site; (b) placing fill in the ditch for a road to cross the ditch at the west side of the Site; (c) placing fill on tidal marsh for a road to the water's edge at the northwestern corner of the Site; (d) mowing vegetation and grading for a road on tidal marsh across the Site; (e) installing containers and trailers on tidal marsh in the western portion of the Site; and (f) installing another trailer or container on the east side of the Site.

On October 21, 2015, representatives of BCDC, the San Francisco Bay Regional Water Quality Control Board (Regional Board), United States Environmental Protection Agency, and the USACE inspected the Site, together with Mr. Sweeney and his counsel. [1] During this Site inspection, BCDC staff observed that Respondents had performed additional work since the November 14, 2014 Site inspection including:

A. Installed a dirt "land bridge" over culverts by placing fill at two locations across the drainage ditch to provide access to portions of the Site;

[1] The findings in the accompanying proposed Cease and Desist and Civil Penalty Order include additional information regarding the Regional Board's enforcement action against Respondents. The Regional Board issued Cleanup and Abatement Order No. R2-2016-0038 to Respondents on August 10, 2016.

B. Constructed a road across the interior of the Site;

C. Excavated four semi-circular ponds in the interior of the Site;

D. Installed a new, unauthorized water-control structure in the western portion of the Site;

E. Moved two storage containers from the northwestern portion of the Site, where they were located during the November 14, 2014, Site inspection, to the interior of the Site and added two additional storage containers;

F. Installed a goat pen and brought a number of goats to the Site;

G. Removed, mowed, grazed, and/or flattened tidal marsh vegetation throughout the interior of the Site; and

H. Planted approximately 14 trees on the Site, all of which had died, apparently due to high salinity levels.

An aerial photograph dated February 10, 2016, shows that Respondents continued to perform unauthorized work at the Site after receiving BCDC's letter dated January 30, 2015 directing that they stop work. The image shows new work (since the Google Earth image dated April 1, 2015) including, but not limited to, installation of two helicopter landing pads and placement of three wind-break platforms, all on tidal marsh.

On February 17, 2016, representatives of the Regional Board performed a boat survey with the Solano County Sheriff Marine Patrol around the perimeter of the Site and observed, among other things: (a) recent unauthorized grading on the east site of the Site that appeared to be maintenance or repair to the new levee; and (b) placement of two mobile helicopter landing pads.

On March 4, 2016, representatives of the Regional Board, escorted by the Solano County Sheriff's Department, inspected the Site pursuant to an Inspection Warrant issued by Solano County Superior Court. During this inspection, Regional Board staff observed that Respondents had performed additional work since the October 21, 2015 Site inspection including: (a)

installed three white flat-rack containers around two green closed freight containers to create an enclosure; (b) installed four flat-rack containers (two red and two blue), painted with a yellow "H," as two helicopter landing pads, one landing pad on the eastern side and one on the western side of the Site; (c) installed a green gate and posts across the ditch crossing on the eastern side of the Site; and (d) mowed tidal marsh vegetation throughout an approximately 1.5-acre area on the eastern side of the Site (this area had not been mowed on October 21, 2015). In addition, Regional Board staff observed that the water in the ditch was bright green in color, and notably different in color compared to the water in Suisun Bay, indicative of stagnant and eutrophic conditions, in contrast to their observation during the October 21, 2015 Site inspection, when the water in the ditch was greenish brown in color and not noticeably different in color in comparison to the water in Suisun Bay.

Respondents have violated and continue to violate the MPA by conducting the unpermitted activities at the Site as described herein, including but not limited to:

A. Placing fill in waters of San Francisco Bay, including tidal marsh, by constructing and rebuilding levees, excavating ditches and four crescent shaped ponds, installing a new dock in Annie Mason Slough, constructing roads, and placing numerous containers, trailers, and other structures and two helipads on tidal marsh; and

B. Making substantial changes in the use of water, land, or structures within the area of the Commission's jurisdiction by: (1) closing all the tidal breaches that existed in 2011 when Mr. Sweeney purchased the Site and thereby cutting off all tidal activity to the interior of the Site; (2) installing a new water control structure in the western portion of the Site; (3) draining the Site to further alter the pre-existing tidal marsh hydrology; (4) removing or destroying tidal marsh vegetation by the placement of fill, excavation activities, mowing activities, drainage activities, and bringing goats to the Site and allowing them to graze on the tidal marsh vegetation; (5) installing numerous trailers and containers and two mobile helipads at the Site; and (6) developing and operating the Site for intensive recreational uses including but not necessarily limited to kite-boarding.

Respondents have violated and continues to violate the SMPA by conducting unpermitted development at the Site as described herein, including but not limited to: (a) placing fill in waters of San Francisco Bay, including tidal marsh, by constructing and rebuilding levees; (b) excavating ditches and four crescent shaped ponds; (c) installing a new water control structure in the western portion of the Site; (d) installing a new dock in Anne Mason Slough; (e) constructing roads; (f) placing numerous containers, trailers and other structures and two mobile helipads on tidal marsh; (g) removing or destroying tidal marsh vegetation by the excavation activities, mowing activities, and bringing goats to the Site and allowing those goats to graze on the tidal marsh vegetation; and (h) developing and operating the Site for intensive recreational uses including but not necessarily limited to kiting.

III. SUMMARY OF A LIST OF ALL ESSENTIAL ALLEGATIONS EITHER ADMITTED OR NOT CONTESTED BY RESPONDENTS

Mr. Sweeney admits that he purchased the Site in 2011 and transferred the property to the Point Buckler Club, LLC in 2014.

Respondents admit or do not contest that they performed the levee construction, excavation, and other work at the Site as alleged (although they characterize the levee construction as levee repair), and that they began conducting and continue to conduct a kiteboarding operation at the Site.

Respondents admit that the SRCD's component of the LLP for the Suisun Marsh includes IMPs for each privately owned "managed wetland" within the primary management area of the Suisun Marsh, and that in 1984, BCDC certified the Annie Mason IMP for the Site. Mr. Sweeney admits that BCDC staff provided him a copy of the Annie Mason IMP in November 2014, when they visited the Site.

Respondents admit that there are numerous aerial photographs of the Site, that various letters were exchanged between BCDC staff and Respondents' counsel, and that BCDC staff and representatives of other agencies visited the Site in October 2015.

IV. DEFENSES AND MITIGATING FACTORS RAISED BY RESPONDENTS; STAFF'S REBUTTAL EVIDENCE AND ARGUMENTS

Respondents' arguments fall into two broad categories. First, they raise potential defenses that challenge the Commission's jurisdiction or the principal allegations in the Complaint as to their liability — namely, that by in engaging activities that constitute "development" under the SMPA and placement of fill, extraction of materials, and/or "substantial change in use" under the MPA, without obtaining a permit from the Commission, Respondents violated both of these laws and thus subjected themselves to liability for the enforcement remedies those laws provide. Under both laws, those remedies include a cease and desist order, subject to terms and conditions necessary to ensure compliance with applicable requirements, and under the MPA those remedies also include an appropriate administrative civil penalty.

Second, Respondents make numerous arguments that do not contest their liability but rather urge that, even if Respondents violated the law, there are mitigating factors that make it unfair, unreasonable, or inequitable to hold them responsible for the violations through the assessment of civil penalties. Because these potential mitigating factors are not responsive to the primary allegations of the Complaint regarding Respondents' liability, they pertain exclusively to exercise of the Commission's discretion in weighing the statutory considerations relevant to determining an appropriate civil penalty.

A. Potential Defenses to Liability

1. **BCDC Has Jurisdiction Over the Site Under the MPA.** Respondents argue that BCDC staff has not established the Commission's jurisdiction over the Site under the MPA, and, therefore, the Commission lack's jurisdiction to impose a penalty. There is no merit to this argument. Statement of Defense (SOD) at 41:7-10 (*i.e.,* page 41, lines 7-10).

At the time Mr. Sweeney purchased the Site, in April 2011, the open water areas at the locations of seven tidal breaches of the remnant levee, and the associated tidal channels allowing tidal exchange with locations in the interior of the Site, clearly were waters of San Francisco Bay subject to tidal action under Government Code Section 66610(a). Moreover, the

Commission's, San Francisco Bay jurisdiction under Section 66610(a) includes both "marshlands lying between mean high tide and five feet above mean sea level" and "tidelands (land lying between mean high tide and mean low tide)." The Regional Board's experts provided documentation, included in the record, establishing that a total of approximately 38.3 acres of the approximately 38.9-acre Site are subject to the Commission's MPA jurisdiction, including approximately 7.7 acres of marshlands and approximately 30.6 acres of tidelands. Point Buckler Technical Assessment Report, Appendix M (Jurisdiction: MPA and SMPA), at Table M-1 and Figure M-1.

2. **There is Substantial Evidence that the Annie Mason IMP Was Never Implemented.** Respondents argue that no evidence supports staff's assertion that the Annie Mason IMP was never implemented. SOD at 24:4-22. To the contrary, the record contains substantial evidence that, to the extent that the Annie Mason IMP calls for periodic inspection, maintenance and repair of levees, these activities were not properly carried out by the prior owners of the Site between 1984 and 2011. The Department of Water Resources (DWR) document that Respondents disparage (*see* Complaint at ¶ VI.I; Chappell Declaration at ¶ 12) stands as one, but by no means the only, example of competent evidence that the record contains that provides support for this conclusion. Moreover, SRCD Director Chappell is competent to offer testimony on what SRCD records show with regard to the history of lack of levee maintenance or repair activities at the Site. Mr. Chappell's testimony that, in contrast to the owners of virtually every other privately-owned managed wetland in the Suisun Marsh, there is not a single record of the owners of Site ever having applied for approval under the applicable USACE RGP for any maintenance project or activity at the Site provides compelling evidence of the failure of the owners of the Site to manage their property in accordance with the Annie Mason IMP.

3. **Respondents' Levee Construction Was Not Consistent with the Annie Mason IMP.** Respondents argue that what they characterize as the levee "repair" was consistent with the Annie Mason IMP. SOD at 21:17-23:17. However, in order for something to be "repaired" or even "restored," there must be something that is the object of such an undertaking. The

evidence in this matter demonstrates that between 1984 and 2011, the owners of Site neglected to maintain the levee around the perimeter of island that existed in 1984 to the point that, by 2011, the levee no longer exercised any effective control over the inflow onto and outflow of water from the island, which was the express purpose for which the levee was initially constructed. Thus, from a purely functional standpoint, the previously existing 1984 levee had ceased to exist. In other words, there was no longer anything to repair, maintain, or even restore.

This conclusion finds support in a comparison of the average elevation of the remnant levee (5.71 ft. NAVD88) with the elevation of the marsh plain on the interior of the island (5.43 ft. NAVD88). It also finds support in the fact that only 17% of the length of the new levee that the Respondents constructed around the Site in 2014 was constructed in the footprint of the 1984 levee. In other words, 83% of the length of the levee that Respondents constructed was located outside the footprint of the 1984 levee. Accordingly, the levee that the Respondent constructed around island in 2014 is properly characterized as a "new levee," not a levee repair.

4. **Whether work specified in an IMP is Exempt from SMPA Permit Requirements.**

According to Respondents, BCDC staff "acknowledges" that work specified in a managed wetland individual management plan (IMP) is exempt from the permit requirements of the SMPA. Pub. Res. Code § 29500. SOD at 20:25-21:16. In asserting this defense, Respondents misrepresent BCDC staff's position, which is that work specified in an IMP is exempt from the permitting requirements of the SMPA only if the IMP is in fact applicable to the private property on which the work is being undertaken.

In this case, the staff's position is that the Annie Mason IMP was no longer applicable to Pt. Buckler when the Respondents undertook their levee construction and other development activities as a result of the Site no longer satisfying the SMPA's definition of a "managed wetland." Respondents place great emphasis on the use of the word "enhancements" in the Suisun Marsh Protection Plan (SMPP) in the context of a description

of the SMPA's permit exemption. However, the term "enhancement" does not appear in the SMPA, the SRCD's Suisun Marsh Management Program, or the Annie Mason IMP. Moreover, the passage from the SMPP cited by Respondents also makes it clear that regardless of whether any particular activity is described as "maintenance, repairs, or enhancements" the SMPA's permit exemption does not apply unless the activity is specifically "described in the [management] plans." If Respondents are arguing that the SMPP's use of the term "enhancement" means that an owner of property subject to an IMP can do whatever he wants to on his property without a permit, regardless of whether the activity is or is not described in the IMP, staff emphatically disagrees.

5. **The Commission's Alleged Failure to Review the IMPs.** Respondents argue that the Annie Mason IMP must remain in effect because BCDC has not performed the 5-year reviews of IMPs as allegedly required by the SMPA. SOD at 23:18-24:3. Staff fails to see the relevance of this "defense." The principal issue in the review to which the Respondents refer is whether or not the Suisun Mash local protection program, including its various components, is being properly implemented. The issue of whether or not any particular IMP continues to apply to private property in the primary management area on the basis of whether or not the property to which it pertains is, or continues to qualify as, a "managed wetland" is an issue that is totally separate and distinct from the issue with which the review to which the Respondents refer is concerned.

6. **Staff Are Allegedly Wrong In Asserting that the Annie Mason IMP is No Longer in Effect Because IMPs Do Not Expire.** Respondents argue that IMPs "exist in perpetuity" because the SMPA fails to expressly provide that an IMP ceases to apply to privately-owned property in the primary management area when that property ceases to be operated as a "managed wetland." SOD at 25:1-26:3. Respondents ignore Public Resources Code Section 29412.5, which states that the purpose of an IMP is to provide standards for the management of "managed wetlands."

Respondents also claim, erroneously, that the SMPA, through provisions governing

SRCD's operation, obligates the owners of private property in the primary management area to manage their property as a "managed wetland." (Respondents misconstrue Public Resources Code Section 9962(a) to be part of the SMPA. It is not, but rather, is contained in a different division of the Public Resources Code.) Respondents' argument represents a serious misinterpretation of the SMPA. Nothing in the SMPA requires an owner of private property to manage his or her property as a "managed wetland." What the SMPA does say is that if a property owner elects to so manage his property, he must do so in accordance with the provisions of a certified IMP.

7. **BCDC Was Allegedly Required to Issue a Permit to Abandon Use of the Site As A Managed Wetland.** According to Respondents, the Site must continue to be recognized as a managed wetland as a matter of law, even if it is not a managed wetland as a matter of fact, unless and until the Commission issues a permit under the MPA approving an "abandonment" of the "managed wetland" status. SOD at 26:4-12. Respondents base this argument on a BCDC regulation that defines "substantial change in use" under the MPA to include "abandonment." 14 C.C.R. § 10125(a). Government Code Section 66632(a) in turn requires a permit for any "substantial change in use of any water, land, or structure…." However, it does not follow that a permit is required for every conceivable incidence of "abandonment."

Government Code Section 66632(a) requires a permit where a person *wishes* to make a substantial change in use. The term "wishes" implies a necessary element of volition or intent before an act of "abandonment" requires a permit. Mere neglect is not sufficient to trigger the need for a permit. There is no evidence that the neglect that resulted in the reversion of the Site to tidal marsh was the result of a conscious choice on the part of the previous owners of the Site during the time that the reversion was occurring.

Even if an argument can be made that the inaction and neglect of Respondents' predecessors might have triggered the need for a permit under the MPA, the fact that no such permit was applied for or issued does not negate the physical facts on the ground of a reversion of the Site to a tidal marsh, or operate as an obstacle to BCDC's ability to take otherwise

appropriate regulatory action in light of such a reversion. For more than 20 years prior to Mr. Sweeney purchasing the Site, the property was not operated as a managed wetland. Thus, use of the Site as a managed wetland was abandoned even though no prior owner applied for or obtained a permit from BCDC.

8. **The Site Allegedly Was Not a Tidal marsh.** Respondents argue that in April 2011 when Mr. Sweeney purchased the Site it was not a tidal marsh. SOD at 6:9-28 and 27:1-32:3. In support of this defense Respondents rely on what they characterize as "four lines of evidence," each of which is addressed below.

First, Respondents rely upon "evidence of the white debris line [also known as the "wrack line"] at the island." In Respondents' view, because aerial photography of the Site before Respondents' construction of the new levee shows the "debris" or "wrack" line outboard of the remnant levee, this means that "the high tide did not overtop the old levee and flow into the center of the island." In a supplemental report, the Regional Board's independent experts carefully analyzed the merits of this argument. *See* Experts' Response to July 11, 2016 Evidence Package (July 21, 2016)(Experts' Response), at 29-31. Essentially, their conclusion is that the position that "overtopping of levees would necessarily result in deposition of driftlines in the interior of Pt. Buckler Island" is unsupportable because, among other things, the levee and fringing tidal marsh...filter and trap most floating tidal litter even during highest tides that overtop levees." In addition, the wrack line is not a static line, as readily evidenced in Figure J-3 of the experts' May 2016 Technical Assessment Report. In that figure, which compares air photos of 2011 and 2016, the debris wrack line has moved further inland along the tidal marsh on the outside of the newly constructed levee, evidencing the dynamic versus static nature of this field indicator.

Second, Respondents rely on the personal observations of Mr. Sweeney who, in a declaration, states that on the many days that he worked on the Site, he "never saw the island under water." Again, the Regional Board's experts conducted a careful evaluation of Mr. Sweeney's claims. Their conclusion was that, given the relative infrequency of full tidal

inundation, it was unremarkable that Mr. Sweeney may not have observed the island in an inundated condition. Experts' Response, at 4-5. Respondents also claim that the use of heavy machinery on the Site is inconsistent with the status of Pt. Buckler as a tidal marsh. The Regional Board's experts also evaluated this argument, and found that, given the nature and circumstances, particularly the load-bearing capacity, of the vegetative cover on the island, the fact that heavy machinery never got "stuck in the mud," to use Respondents' terminology, was not inconsistent with Pt. Buckler's status as a tidal marsh. *Id.* at 28-29.

Third, Respondents rely on available aerial photography, and on one particular infrared photo (NOAA, 2013) "taken at mean high water," and argue that the absence of visible ponding on such photography is inconsistent with Pt. Buckler's status as a tidal marsh. The 2013 infrared NOAA photograph, as attached to the analysis prepared by Respondents' consultant, Applied Water Resources, entitled "Conditions at Pt. Buckler" and dated October. 16, 2015, has no date or time stamp affixed to it, nor does the table in the report provide any time information beyond "2013," so it is impossible to verify if or whether it was in fact "taken at mean high water" and how the consultant purportedly determined the photo to represent mean high water. Moreover, as the Regional Board's experts note in their response, "the type of tall vegetation on [Pt. Buckler] can readily obscure tidal inundation." Experts' Response, at 6. Therefore, the absence of visible ponding in the subject aerial photographs neither conclusively refutes nor even offers any contrary evidence whatsoever regarding the status of Pt. Buckler as a tidal marsh.

Fourth, and finally, Respondents argue that the Regional Boards' experts acknowledgement that the areas on Pt. Buckler's interior marsh plain outside of channels and ditches do not experience "daily tidal inundation" means that such areas do not meet the definition of "tidal marsh" set forth in the SRCD's Suisun Marsh Management Plan, which defines "tidal marsh" as "areas…which are subject to daily tidal action." However, under widely accepted principles of tidal marsh hydrology, "tidal inundation" does not represent the only way in which a tidal marsh can be considered to be "subject to daily tidal action." Specifically,

the daily ebb and flow of tidal waters in a tidal marsh renourishes and supports a high water table that in turn results in the saturated soil conditions that make it possible for obligate and facultative salt marsh vegetation to propagate and grow. Thus, in this sense tidal marsh vegetation can legitimately be considered to be "subject to daily tidal action" even in the absence of daily inundation of the marsh plain surface soils. *See* Letter from Stuart Siegel to Marc Zeppetello, September 21, 2016 (re: Role of Daily Ebb and Flow of the Tides in Establishing Tidal Marsh).

B. **Potential Mitigating Factors**

1. **BCDC Staff Is Allegedly Partially Responsible for Respondents' Violations.**

Respondents argue that, for a number of reasons, BCDC staff is "at least partially responsible for the problems that have arisen at [the Site]" SOD at 12:19.

First, Respondents claim that BCDC staff allegedly told Mr. Sweeney in 2011 that the Site was not in "BCDC territory." SOD at 5:22-6:8. Specifically, Mr. Sweeney claims that BCDC's Chief of Enforcement, Adrienne Klein, informed him that Point Buckler is not located in BCDC's jurisdiction. However, Ms. Klein never made such a statement, and believes that Ms. Sweeney drew false conclusions from second-hand information from others. Declaration of Adrienne Klein (September 23, 2016) at ¶¶ 1-14.

The evidence relied on by Respondents for this claim includes an August 31, 2011, email from Zachary Cohn, of Salt River Dredge, to Mr. Sweeney, which simply states that Ms. Klein had unofficially informed Mr. Cohn that the docks being placed upland on Mr. Sweeney's property at Chipps Island are "OK," and says nothing about BCDC's jurisdiction. BCDC staff objects to consideration of the handwritten notations on the email, stating that "Chipps & Buckler not in BCDC territory," on the grounds of both self-serving hearsay and unreliability; Mr. Sweeney provides no explanation as to why there would have been any reason from him to

ask Ms. Klein at that time whether Pt. Buckler was in BCDC's jurisdiction, given that the docks

were proposed to be moved to Chipps Island.[2] Respondents also rely on a BCDC enforcement report that refers to Chipps Island and says noting about Pt. Buckler.

Second, Respondents complain that BCDC observed levee construction activity at the Site in March 2014, when only a small portion of the levee work had been done, but did not contact Mr. Sweeney for seven months, until October 2014, when the levee work was effectively completed, to request a Site visit. SOD at 8:1-16. In March 2014, BCDC staff observed, from the western levee on Simmons Island, located approximately 100 yards east of the Site, that heavy machinery was on the Site and that substantial landform alternation had occurred. However, it was impossible for staff to know that Respondents were just beginning extensive levee construction and excavation work around the entire perimeter of the Site that would continue for months. Following their observations in March 2014, BCDC staff conducted research and consulted with other agencies in an effort to determine whether the work on the Site was being done as part of an authorized restoration or mitigation project. Staff contacted Mr. Sweeney in due course after determining that was not the case.

Finally, Respondents argue that BCDC staff changed position between the November 2014 Site visit and staff's January 30, 2015 letter describing numerous violations at the Site. SOD at 8:18-28. Respondents claim that during the Site visit staff told Mr. Sweeney "that *if his work was done in accordance with* the [Annie Mason IMP] it was OK," SOD at 8 :19-20 (emphasis added), but in their subsequent letter staff stated that the Site had never been managed in accordance with the Annie Mason IMP or satisfied the definition of managed wetland, and had long ago reverted to tidal marsh. However, there is no inconsistency between staff's general statement that work specified in an IMP does not require a permit and

[2] BCDC staff also objects to the assertion in Respondents' Statement of Defense that "the previous owner told [Mr. Sweeney] that DWR was requiring that the levee be repaired." SOD at 5:21. Mr. Sweeney's declaration, cited in support of this assertion, does not include such a claim. On a related point, there is substantial evidence that, notwithstanding Mr. Sweeney's unsupported hearsay claim to the contrary, DWR never installed a pump at the Site. Chappell Declaration at ¶ 8; Annie Mason Unit Regulatory History, Complied by Kristin Garrison, DWR (Jan. 20, 2016); Regional Board Memorandum re: DWR Confirms Point Buckler is Not Required Mitigation and No Pump Installed (June 30, 2016).

staff's subsequent determination, based on consideration of all available information, that the Site had reverted to tidal marsh and that the work performed by Respondents was not authorized by the Annie Mason IMP.

During the Site visit, staff was focused on gathering information regarding Site conditions and Mr. Sweeney's activities at the Site. It would not have been appropriate for staff to make a determination on the spot regarding the status of the Annie Mason IMP or the Respondents violations of the law. In any case, Respondents' unsupported claim that staff changed position between the Site visit and the January 30, 2015 letter is irrelevant because Respondents had already substantially completed the levee construction and excavation work at the time of the Site visit. Respondents' do not, and cannot, claim that they somehow relied to their detriment on BCDC staff's statements during the November Site visit.

Respondents suggest that if BCDC staff had acted more quickly "to inform Mr. Sweeney of their concerns in March 2014, things would have been very different." SOD at 8:12-13. However, Respondents do not dispute that they continued to perform unauthorized work at the Site after receiving BCDC staff's January 30, 2015 letter requesting that Respondents stop work and directing them to apply for a permit. Respondents' complete disregard of that enforcement letter strongly demonstrates that BCDC staff bears no responsibility for Respondents' violations.

2. **Respondents' Argue that Mr. Sweeney Did What He Thought He Was Supposed to Do.** Respondents argue that because BCDC allegedly told Mr. Sweeney that the Site was not within BCDC's jurisdiction, it can hardly be surprising that he did not apply for a BCDC permit. SOD at 36:11-12. Mr. Sweeney's unsupported and erroneous claim that BCDC informed him that the agency did not have jurisdiction over the Site is discussed above. In addition, there is substantial independent evidence that demonstrates Mr. Sweeney could not reasonably have believed in 2012, before he started construction work at the Site, that no permit was required, from any regulatory agency, for the work he planned to do. To the contrary, before Mr. Sweeney began conducting levee construction and excavation activities at the Site, he knew

that the placement of fill on levees in managed wetlands in the Suisun Marsh, including levee repair work, requires authorization from multiple agencies.

Specifically, in June 2011, Mr. Sweeney contacted the SRCD and the USACE regarding proposed levee repair work at Chipps Island (Club 915) in the Suisun Marsh. SRCD provided Mr. Sweeney with copies of the USACE's Regional General Permit (RPG) and a relevant Biological Opinion prepared by the National Marine Fisheries Services, and Mr. Sweeney completed a USACE Wetlands Maintenance Permit Application. Working with SRCD through the permitting process, Mr. Sweeney obtained authorization from the USACE to perform the levee repair under the RGP. However, Mr. Sweeney did not adhere to the conditions of the RGP, and on October 24, 2011, the USACE issued a Notice of Violation to Mr. Sweeney regarding his unauthorized work at Chipps Island that resulted in an illegal discharge of fill. Email message from David Wickens, USACE, dated June 23, 2011; USACE Wetlands Maintenance Permit Application prepared by John Sweeney and approved by the USACE on June 24, 2011; letter from Steve Chappell, SRCD to David Wickens, USACE, dated September 2011; USACE Notice of Violation issued to John Sweeney, dated October 24, 2011.

BCDC staff believes that when Mr. Sweeney contemplated the nature and extent of the levee construction, excavation, and other work that he planned to perform at the Site, based on his experience working with SRCD and the USACE to obtain authorization for a levee repair at Chipps Island, he made a knowing and intentional decision to proceed without contacting SRCD, the USACE, or BCDC, and without applying for any of the permits that he knew or should have known were required. Staff further believes that Mr. Sweeney intentionally proceeded without contacting any regulatory agency to avoid the expense and delay of the permitting process, including the costs that would have been associated with providing mitigation for adverse impacts to tidal marsh, biological resources, and water quality. Although Mr. Sweeney may have considered that he might later have to obtain after-the-fact authorization for his work, by proceeding without applying for the necessary permits, Respondents benefitted economically by being able to conduct their kiteboarding business, and

to expand their kiteboarding operations in the northwestern portion of the Site, for the past two years without having those operations disrupted or damaged from tidal action, including tidal flooding from periodic overtopping of the remnant levees.

3. **Respondents claim Mr. Sweeney truly wants to restore a duck club.** Respondents argue that Mr. Sweeney's purpose in reconstructing the levee was to restore duck ponds and that this work was not needed for kiteboarding. SOD at 7:12-15. However, Mr. Sweeney admits that he did not even have a copy of the Annie Mason IMP until BCDC staff gave him a copy during a Site inspection in November 2014, after Mr. Sweeney had completed construction of the levee around the entire perimeter of the island. BCDC staff believes that Mr. Sweeney's claim that he wants to restore a duck club, or managed wetland, at the Site is one that he adopted as a post-hoc rationalization, only after his legal counsel advised him that doing so was the only way he could evade responsibility for his unlawful actions – by arguing that no BCDC permit was required because his work was allegedly consistent with the Annie Mason IMP.

As noted above, reconstruction of the levee around the Site enabled Respondents to conduct their kiteboarding business, and to expand their kiteboarding operations in the northwestern portion of the Site, without having those operations disrupted or damaged from tidal action, including tidal flooding from periodic overtopping of the remnant levees. On the other hand, Respondents' development activities at the Site are not consistent with operating the property as a managed wetland for duck hunting. For example, cyclic flooding and draining of the Site as a managed wetland would require at least two water control structures (as specified in the Annie Mason IMP), yet Respondents installed only one tide gate. Moreover, the poor water and sediment quality in the four crescent ponds Respondents' excavated are inconsistent with managed waterfowl pond objectives. *See* Experts' Response, at 20-23 (Sweeney Site Management Actions Are Inconsistent with Suisun Marsh Duck Club Management Strategies).

To support their claim that Mr. Sweeney wants to restore a duck club, Respondents also argue that they did not drain the island and there has been no significant change in vegetation. SOD at 32:4-21. However, according to the Regional Board's experts, following levee construction in 2014, the newly-diked wetlands were permanently drained, rather than being flooded periodically according to the water management recommendation in the Annie Mason IMP. Experts' Response at 20. Moreover, there is abundant evidence of a massive change in the nature and abundance of vegetation on the Site as a result of the Respondents' activity, which the experts characterize as a "mass dieback (mortality)." *Id.* at 27-28.

4. **The Suisun Marsh Protection Plan Emphasizes the Importance of Duck Ponds.** Respondents argue that Mr. Sweeney should not be penalized for his efforts to restore the managed wetlands at the Site because the Suisun Marsh Protection Plan (SMPP) emphasizes the importance of duck clubs and the waterfowl habitat they provide. SOD at 32:22-35:9. Respondent cites a number of findings and policies from the SMPP that describe the important role that duck clubs, and their associated waterfowl habitatt, in the overall ecology of the Suisun Marsh. However, these SMPP provisions cannot be considered in isolation, as Respondents do. Rather, they must be considered together with other provisions of the SMPP that place equal importance on preservation of the tidal marsh areas of the Suisun Marsh. For example:

a. Tidal marsh is an important habitat for many wildlife species, including the endangered salt marsh harvest mouse and the Suisun shrew. Tidal marshes also contribute to the maintenance of water quality in the San Francisco Bay. SMPP at 12 (Environment, Finding 4).

b. The tidal marshes of the Suisun Marsh are an important wildlife habitat and also contribute to the maintenance of water quality in the San Francisco Bay. SMPP at 34 (Land Use and Marsh Management, Finding 1).

c. The tidal marshes in the primary management area should be preserved. *Id.* (Land Use and Marsh Management, Policy 3).

Most importantly, there is no provision in the SMPA or the SMPP that authorizes the conversion of, or even contemplates circumstances under which it might be permissible to convert, an area of tidal marsh into a duck club or managed wetland. In fact, the SRCD's Suisun Marsh Management Program, as certified by the BCDC, expressly states that "the policies of the [SMMP] prohibit future conversion of tidal marsh or open water areas to managed wetland or agricultural status." SMPP at 13 (§ II.C.1).

5. **Respondents Argue That They Should Not Be Penalized Because BCDC Gave Another Managed Wetland Additional Time to Repair A Levee.** Respondents complain that BCDC has not been even-handed because it gave another duck club an opportunity to repair a levee that had been breached for as long as 15 years. SOD, at 20:8-24. However, as described in a letter from a representative of the owner of that duck club (Dante Farms, Club # 910 on Chipps Island) there are critically important factual distinctions between the alleged analogous situation referred to there and the circumstances of Pt. Buckler. First, the damaged portion of the levee at Dante Farms represented a relatively small proportion, no greater than 20%, of the entire length of the exterior perimeter levee for that duck club, as shown on an aerial photograph that accompanied the letter. Second, as stated in the letter, the "tidal action [resulting from the damages to the levee] affects only a portion of the property, predominantly in the southwestern side." Finally, the letter ascribes the cause of the damages to the levee to actions by other parties, specifically to "wave action from passing ships of larger draft travelling to the Port of Stockton [through the Stockton Ship Channel]." Letter from Joel Ellinwood to Ming Yeung (December 11, 2009).

There are significant differences between the circumstances presented at Dante Farms and those involved in the Pt. Buckler situation, including but not limited to: (1) degradation of almost the entire perimeter levee; (2) the introduction of tidal influence to essentially the entire island; and (3) principal causal factors in the form of owner neglect and inactivity. Moreover, the owner of Dante Farms contacted BCDC in advance of performing the

levee repair to work out an acceptable resolution of the situation at that property, whereas Respondents proceeded unilaterally, without contacting BCDC or any other regulatory agency, to conduct extensive levee construction work without authorization.

6. **Staff Has Proposed Penalties Under the MPA, Not the SMPA.** The Complaint proposes an administrative penalty of $952,000 under Government Code Section 66641.5(e). At the outset, it is important to note that although the Complaint alleges numerous violations of both the MPA and the SMPA, staff proposed the penalty solely for violations of the MPA. Specifically, the penalty was proposed for a number of listed violations of Government Code Section 66632, which requires any person wishing to place fill, to extract materials, or to make any substantial change in use of any water, land, or structure within the area of the Commission's jurisdiction, including the Site, to obtain a permit from the Commission. No penalty is proposed for Respondents violations of the SMPA.

7. **Staff Has Not Improperly Counted the Violations.** Noting that Government Code Section 66641.5(e) authorizes a maximum penalty of $30,000 per violation, Respondents argue that staff has improperly counted the violations. SOD at 14:7-27. Respondents' primary complaint is that staff improperly counted the levee construction, interior ditch excavation, and associated work as eleven violations rather than one violation. Similarly, Respondents' claim that staff improperly counted the construction of four crescent-shaped ponds as four violations and the installation of a dock, followed by installation of an expanded dock, as two violations. There is no merit to Respondents' argument that staff over-counted the violations.

Before turning to the violations at issue, consider the hypothetical situation of a property owner placing, without a permit, 100 cubic yards of fill in the Bay at location A on a parcel of property. The placement of such fill would be a single violation of the MPA. If the property owner then placed another 100 cubic yards of fill in the Bay at location B, at the other side of the property, that would be a separate, second violation. The placement of fill at two discrete locations is properly considered to be two violations because each violation involved discrete actions on the part of the property owner, at discrete times, and because each

instance of the unauthorized placement of fill would result in discrete impacts at the different locations. Moreover, the placement of fill at two discrete locations is appropriately considered two violations because, if the property owner had applied for a permit for this work, the permit would have separately authorized the placement of fill at each of the two locations.

As applied to Respondents' unauthorized conduct, their placement of fill in the Bay at each of seven discrete locations, at various points on the Site, to close seven different tidal breaches, and resulting in adverse impacts to biological resources and water quality at each location, is properly considered to be seven violations. Similarly, constructing four crescent ponds, at four different locations at the Site, is properly considered to be four violations, and the installation of a dock, followed later by installation of an larger dock, thereby resulting in additional Bay fill, is properly considered to be two violations.

The Complaint treats as a single violation the placement of fill in the Bay to construct new levees around the Site at all locations other than the discrete locations where Respondents placed fill to close a tidal breach. The Complaint treats as a single violation Respondents' excavation of the ditch interior to the levees around the Site. In these cases, given that these activities could not reasonably be considered to constitute a number of discrete violations, they were each considered a single, indivisible violation. Similarly, the Complaint treats as a single violation the removal, mowing, and/or destruction of tidal marsh vegetation even though Respondents conducted these activities at various locations around the Site and at various times. However, the placement of fill in the Bay to construct two land bridges over culverts installed in the interior ditch, on opposite sides of the Site, were properly considered two violations. Similarly, each and every army trailer or storage container, and each of the two helicopter landing pads, each constituting a separate and discrete placement of fill, were properly considered to be separate violations.

8. **The Proposed Penalties Account for the Statutory Factors.** There is no merit to Respondents' argument that the proposed penalties do not account for the statutory factors the Commission is required to consider in determining the amount of administrative civil liability. SOD at 15:1-17:28.

Government Code Section 66641.9(a) states:

> *In determining the amount of administrative civil liability, the commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.*

In addition, Government Code Section 66641.5(e) provides that the Commission may administratively impose civil liability for any violation of the MPA in an amount of which shall not be less than $10 nor more than $2,000 for each day in which the violation occurs or persists, but may not administratively impose a penalty of more than $30,000 for a single violation.

The Complaint includes a table describing each violation, explaining how the work or activity violates the MPA (*i.e.,* Govt Code § 66632), and the amount of the penalty sought for each violation. The chart demonstrates that staff carefully considered the penalty factors specified in Government Code Section 66641.9(e) because different penalty amounts are proposed for each violation as appropriate, depending on the circumstances associated with each violation. In particular, a penalty at the high end of the range authorized by Government Code Section 66641.5(e), $2,000 per day, is proposed for certain violations, such as the

placement of fill in the Bay for levee construction, whereas violation-specific penalties of $1,500 per day, $1,000 per day, $500 per day, $200 per day, and $100 per day are proposed for other violations.

The Complaint does not include a detailed analysis of the statutory penalty factors because none is required. Rather, if staff is proposing that the Commission impose an administrative civil penalty, BCDC's regulations require only that the Complaint state "the amount of the proposed penalty." 14 C.C.R. § 11321(a)(2) and Appendix H, paragraph 8. However, because the Commission is required to take into consideration the factors specified in Government Code Section 66641.9(a) in determining an appropriate penalty, proposed findings on those penalty factors are set forth in the proposed Cease and Desist and Civil Penalty Order for the Enforcement Committee's, and the Commission's, consideration.

9. **Respondents' Other Objections to the Proposed Penalties for Specific Violations.** Most of Respondents arguments challenging the proposed penalties for specific violations are addressed above in response to Respondents' erroneous claim that staff improperly counted the violations. Staff's responses to a number of additional arguments raised by Respondents as to particular violations are discussed below.

a. **Penalties are appropriate for the multiple trailers and containers.** Respondents argue that a token penalty, at most, should be imposed for the numerous trailers and containers that Respondents placed on tidal marsh at the Site. SOD at 36:25-37:18. Respondents claim that at most the multiple trailers and containers should be treated as a single violation and also suggest they are being treated unfairly because BCDC had not taken enforcement action against any other duck club in the Suisun Marsh for the placement of containers.

First, as stated above, each individual trailer or container is properly considered a separate violation because each is a separate placement of fill within the Commission's MPA jurisdiction, resulting in discrete impacts, and each also represents a change in use from undeveloped Site conditions to accessory structures associated with Respondents' kiteboarding operations.

Second, Respondents are incorrect in claiming that BCDC has not pursued enforcement against any other duck club in the Suisun Marsh for the placement of containers (although were that in fact true it would not preclude the Commission from issuing a cease and desist and civil penalty order in this case). In response to a recent Public Records Act request from Respondents, BCDC produced documents showing that, on a number of occasions, it notified the owners of managed wetlands in the Suisun Marsh that the trailers or containers on their property were unauthorized and directed those owners to apply for a permit. See Declaration of Adrienne Klein at ¶ 15 (BCDC has issued two cease and desist orders, entered into one settlement agreement, and written six enforcement letters regarding unauthorized activities in Suisun Marsh).

Third, the containers and trailers that other property owners in the Suisun Marsh may have placed on their property are presumably associated in some way associated with the use and management of their property as a managed wetland. What distinguishes Respondents' containers and trailers is that they are associated with a use of the Site for a different purpose – kiteboarding -- that is entirely unrelated to the uses to which reference is made in the SMPA's definition of a "managed wetland." The association of Respondents trailers and containers with a change in use that is completely foreign to the framework of the SMPA distinguishes them from the similar structures on other properties.

b. **Penalties are appropriate for excavation of the four crescent ponds.**

Respondents argue that no penalty should be imposed for the four crescent ponds because the ponds are consistent with the Annie Mason IMP, duck ponds are favored by the SMPA and Suisun Marsh Protection Plan, and the ponds did no harm. SOD at 38:17-39:7. Staff disagrees.

First, neither the ponds Respondents excavated nor any other ponds are specified in the Annie Mason IMP. Therefore, a permit was required to construct each pond.

Second, Respondents' generalized claim that duck ponds are favored in the Suisun Marsh is irrelevant. Whether or not duck clubs are "favored" in managed wetlands, a permit is required for the excavation of material, placement of fill, and a substantial change of use of land or water.

Third, as discussed above, the Suisun Marsh Protection Plan also contains policies calling for the protection of tidal marsh – policies that Respondents violated by excavating the ponds in tidal marsh at the Site.

Fourth, the excavation of each of pond (and the placement of the excavated fill adjacent to each pond) caused discrete impacts and is properly considered a separate violation.

c. **A penalty is appropriate for kiteboarding as a substantial change of use.** Respondents argue that a penalty for kiteboarding as a substantial change of use is over-counting in light of the penalties proposed for the trailers (club house) and "associated facilities." SOD at 37:19-22. However, before Respondents began their unauthorized activities, the Site was undeveloped tidal marsh. Respondents' kiteboarding operation is a substantial change in use under Government Code Section 66632 and is properly considered a separate violation from the unauthorized placement of fill associated with Respondents' levee construction, trailers and containers, and other work.

d. **A penalty is appropriate for construction of roads.** Respondents claim that staff is mistaken in claiming that fill was placed for the construction of roads in both the northwestern portion of the Site and across the entire Site. SOD at 39:8:14. According to Respondents, they made the roads by cutting vegetation, not by the placement of fill. Assuming Respondents are correct, and that no fill was placed, the violations alleged in the Complaint associated with the road are for both the placement of fill and a substantial change in use. As noted above, before Respondents began their unauthorized activities, the Site was

undeveloped tidal marsh. The construction of two roads that allow vehicle access throughout the Site are substantial changes of use that are properly considered as two violation, even if the roads were constructed by destroying vegetation rather than by the placement of fill.

e. **A penalty is appropriate for installation of a new water control structure.**

Respondents cite no evidence in support of their claim that no new water control structure was installed in the western portion of the Site. SOD at 39:23-40:2. Respondents' Statement of Defense cites Mr. Sweeney's declaration in support of this claim, but without reference to a specific paragraph of the declaration, and the declaration itself does not make this assertion. In any case, the Annie Mason IMP identifies two water control structures (one on the north side and one on the east side of the Site), but neither was located on the western portion of the Site. Moreover, the aerial photographs show that the new water control structure was installed in an area where, in 2011, the prior remnant levee no longer existed, demonstrating that the new water control structure was in fact installed by Respondents in conjunction with their unauthorized levee construction work in 2014. A penalty is appropriate for this violation of the MPA.

f. **A penalty is appropriate for the removal of a former water control structure.**

Respondents argue that a penalty should not imposed for removal of a non-functional water control structure as part of Respondents levee construction work because it makes no difference whether the structure was removed, as opposed to having been left in place and buried by unauthorized fill. SOD at 40:3-8. However, the violation associated with removal of the water control structure is a substantial change in use, not placement of fill. Although Respondents claim that Mr. Sweeney "truly wants to restore the duck club," their actions in removing one of the water control structure identified in the Annie Mason IMP was a substantial change in use that demonstrates that Mr. Sweeney had no intention of planning to operate the Site as a managed wetland.

10. **Respondents Other Arguments for Mitigating the Proposed Penalty.** Respondents make a number of additional arguments challenging the proposed penalty as inappropriate that are not related to specific alleged violations. Those arguments include: (1) penalties should be waived or stayed because Respondents have agreed to apply for a permit (*Id.* at 18:12-18); (2) it would be inappropriate to impose a penalty when staff refused to negotiate (*Id.* at 18:1-11); (3) Mr. Sweeney should not be penalized for exercising his constitutional rights (*Id.* at 42:3-44:19); and (4) every dollar spent on penalties is a dollar that cannot be spent on restoration (*Id.* at 18:22-19:24). Each of these arguments is discussed below.

a. **Penalties Should Not Be Waived or Stayed Because Respondents Have Agreed to Apply for a Permit.** BCDC staff strongly disagrees with Respondents' argument that penalties are inappropriate because Respondents have agreed to apply for permits, or that any penalties should be waived or stayed as long as permitting is proceeding. As a threshold matter, the appropriateness of penalties for Respondents' ongoing violations of the MPA is an entirely separate issue from whether Respondents may apply for a permit to seek after-the-fact authorization for their construction activities and other work at the Site. Moreover, it should be noted that Respondents' agreed to apply to BCDC for a permit only after they were ordered to do so -- after the Executive Director issued a cease and desist order on April 22, 2016 that, among other provisions, requires Respondents to submit a permit application to seek after-the-fact authorization for the work they performed at the Site.

To put in context Respondents' claim that their willingness to apply for a permit should be a mitigating factor in imposing a penalty, BCDC first requested that Respondents' apply to BCDC for a permit in a letter dated January 30, 2015, almost 20 months ago. Respondents failed to do so. On April 22, 2016, the Executive Director issued a cease and desist order that, among other requirements, directed Respondents to submit a permit application within 60 days, or by no later than June 21, 2016, to request authorization from the Commission for the placement of fill, substantial change in use and/or development activities that they have conducted or performed at the Site at any time since Mr. Sweeney purchased

the Site. Respondents failed to do so. Instead, at Respondents' request, BCDC staff twice extended and ultimately suspended the deadline for Respondents' to submit a permit application pursuant to the Executive Director's order.

Respondents have met twice in recent months with the staffs of BCDC, the Regional Board, and the USEPA to discuss restoration of the Site and permitting issues, and at the second meeting, in July, Respondents submitted a conceptual proposal for both restoration and development of the Site. None of the agencies has either rejected or endorsed Respondents' proposal. Rather, the agencies found that the conceptual proposal did not provide a productive basis for discussion, because the proposal was not supported by any technical analysis regarding what amount of tidal action would be necessary to restore tidal marsh at the Site. Moreover, Respondents have consistently refused to discuss mitigation for the unauthorized placement of fill at the Site, and the associated impacts to biological resources and water quality, which will be critical to consideration of any permit application, on the grounds that Respondents and the agencies are likely too far apart on the issue of mitigation. The primary reason Respondents and the agencies will disagree on mitigation requirements is that Respondents continue to dispute that the Site was a tidal marsh in 2011 and claim instead that the areas impacted by Respondents' construction activities were upland.

Thus, while Respondents will eventually submit a permit application to BCDC – the proposed Cease and Desist and Civil Penalty Order would require them to do so by March 10, 2017 -- the issue of an appropriate penalty for Respondents' violations is distinct from permitting and should be resolved now.

b. **Staff Has Not Refused to Negotiate.** Respondents complain that BCDC refused to discuss potential resolution of the violations in response to a letter from Respondents' counsel in February 2016. BCDC staff has at all times been agreeable to meeting with Respondents together with the Regional Board staff to discuss potential resolution of the violations, including restoration and permitting issues. BCDC staff felt strongly that it was important that the Regional Board staff also participate in any meetings with Respondents to

provide a coordinated response to Respondents. The February 16, 2016 letter from Respondents, while expressing interest in resolution, also notified BCDC that a meeting among the agencies and Respondents which had been scheduled for February 22nd had been postponed because the Regional Board wanted to collect certain additional Site information on its own, after Respondents had failed to collect the information as required by the Regional Board's initial Cleanup and Abatement Order (issued in September 2015). A few months later, On May 18th, Respondents cancelled another scheduled meeting, on the morning of the meeting, after the Regional Board issued its tentative Cleanup and Abatement Order and Administrative Civil Liability Complaint.

As noted above, more recently, BCDC staff has participated in two meetings with Respondents and the staffs of the Regional Board and USEPA to discuss Site restoration and permitting issues, and another such meeting is scheduled for October, but the discussions provide no basis for deferring issuance of the proposed Cease and Desist and Civil Penalty Order.

BCDC did not offer to attempt to negotiate a stipulated penalty with Respondents prior to issuance of the Complaint. However, in September 2016, prior to Respondents' submission of their Statement of Defense, BCDC's Chief Counsel raised with Respondents' counsel the possibility of negotiating an agreement regarding a proposed penalty. Respondents' counsel responded that it was likely that BCDC staff and Respondents are too far apart on an appropriate penalty and did not pursue the matter.

c. **BCDC Staff Is Not Penalizing Mr. Sweeny for Exercising His Constitutional Rights.** Respondents argue that Mr. Sweeney is being penalized for exercising his constitutional rights when he sued the Regional Board regarding its issuance of its initial Cleanup and Abatement Order in September 2015. According to Respondents, BCDC and Regional Board staffs are being vindictive and "have colluded" to impose substantial penalties and "take away everything [Mr. Sweeney] has." SOD at 42:17-18. Respondents cite no evidence in support of these conclusory assertions, and there is none. The fact that BCDC and the Regional Board

staffs are independently pursuing enforcement actions for some of the most egregious violations of the statutes that each agency, respectively, administers, in the collective professional experience of their staffs, is not evidence of vindictiveness or that the staffs are in collusion to penalize Mr. Sweeney for exercising his constitutional rights.

BCDC and Regional Board staffs have coordinated in investigating Respondents' unauthorized activities at the Site, sharing evidence in support of their respective enforcement actions, and in meeting with Respondents to discuss restoration and permitting issues. However, BCDC and Regional Board staffs have not coordinated or even consulted with one another regarding the penalties that each has proposed under its authorizing statute – respectively, the MPA for BCDC and the Porter Cologne Water Quality Control Act for the Regional Board. BCDC staff has proposed appropriate penalties for Respondents' violations of the MPA based on consideration of the appropriate penalty factors set forth in Government Code Section 66641.9. The proposed penalties do not violate constitutional protections.

d. **Respondents' Claim that Mr. Sweeney's Money Should be Spent on Restoration, not Penalties.** Respondents argue that Mr. Sweeney is an individual with limited assets and that every dollar he has to spend on penalties, or on legal fees challenging BCDC and the Regional Board's enforcement orders, is a dollar that will not be available to restore and improve the Site. SOD at 18:22-19:24.

The Regional Board staff investigated and analyzed Respondents' financial resources, and determined that Respondents had the ability to pay a substantial penalty. Regional Board Prosecution Team's Staff Summary Report, Administrative Civil Liability Complaint R2-2016-1008 (September 2, 2016), at 6-7. Respondents claim that the Regional Board made a number of factual errors in its analysis of their assets, but have submitted no evidence of Mr. Sweeney's assets, or the assets of Point Buckler Club, LLC, to establish that they would be unable to pay the penalty proposed by BCDC staff in the Complaint.

If Respondents were to provide evidence of Mr. Sweeney's and Point Buckler Club, LLC's assets, and if that financial information were to demonstrate that Respondents may not be able to pay the proposed penalty and also restore the Site, BCDC staff would consider proposing that a portion of the penalty be suspended subject to certain conditions. Those conditions would include, but might not be limited to, requiring Respondents to deposit any portion of the penalty that is suspended into an escrow account and to agree that the funds in the escrow account would be used solely for implementation of the Restoration Plan at the Site, as required by the Commission's Cease and Desist and Civil Penalty Order (as further discussed in the Recommendation section, below), and that funds would be disbursed from the escrow account for these purposes only upon the written approval of the Executive Director).

V. EXECUTIVE DIRECTOR CEASE AND DESIST ORDER ISSUED APRIL 22, 2016

On April 22, 2016, the Executive Director issued a Cease and Desist Order to Respondents directing them, among other provisions, to cease and desist from further violating the MPA and SMPA at the Site. Respondents and BCDC staff have stipulated to two extensions to the 90-day expiration date of the Executive Director's order (Govt. Code § 66637(c)), which, unless further extended, will expire on November 17, 2016.

VI. RECOMMENDATION

The Executive Director recommends that the Enforcement Committee adopt the accompanying proposed Cease and Desist and Civil Penalty Order No. CCD 2016.02 (Order) to Point Buckler Club, LLC and John Donnelly Sweeny. In summary, the proposed Order would require Respondents to:

A. Cease and desist from:

1. Placing any fill within, or making any substantial change in use of, any area subject to tidal action, or that was subject to tidal action before Respondent performed the unauthorized activities described in the Order, at the Site without securing a permit from the Commission under the MPA, and

2. Conducting or engaging in any activity on the Site constituting "development," as defined in the SMPA, without securing a marsh development permit from the Commission under the SMPA.

B. Submit a Point Buckler Restoration Plan, acceptable to the Executive Director, by no later than February 10, 2017, that includes: (1) a Restoration Plan describing corrective actions designed to restore, at a minimum, the water quality functions and values of the tidal marsh existing at the Site prior to Respondents' unauthorized activities; and (2) a Restoration Monitoring Plan that includes monitoring methods and performance criteria designed to monitor and evaluate the success of the implemented restoration objectives. This condition of the proposed Order is identical to a condition in the Regional Board's Cleanup and Abatement Order No. R2-2016-0038 issued to Respondents on August 10, 2016 (Regional Board Order).

C. Submit a Mitigation and Monitoring Plan, acceptable to the Executive Director, by no later than February 10, 2017, that includes a proposal to provide compensatory mitigation to compensate for any temporal and permanent impacts to wetlands and other waters of the State that resulted from Respondents unauthorized activities at the Site. This condition of the proposed Order is identical to a condition in the Regional Board Order.

D. By no later than March 10, 2017, apply for a permit to request authorization from the Commission for the placement of fill, extraction of materials, substantial change of use, and/or development activities that Respondents have conducted or performed at the Site at any time from April 19, 2011 through the date of the Order.

E. Apply for and obtain a permit from the Commission prior to any placement of fill, extraction of materials, substantial change in use, or development activities that Respondents propose to undertake or conduct at the Site after the date of the Order.